

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Case No.: 09-CV-03226-LHK
ORDER DENYING MOTION TO DISMISS; DISMISSING DEFENDANTS KAHNG AND SAYLOR WITHOUT
PREJUDICE

1 has, a condition known as Charcot Joint, in which the bones of his right ankle are unsupported. *Id.*
2 To provide support and regulate blood flow in his right ankle, Plaintiff wore a “camwalker,” a
3 custom-designed orthotic device that fit his right foot and ankle. *Id.*

4 On January 31, 2005, Plaintiff was transferred from Monterey County Jail to North Kern
5 State Prison. SAC ¶ 14. Upon arrival at North Kern, Plaintiff’s camwalker was taken from him,
6 apparently because the metal contained in the camwalker presented a security threat. *Id.* At North
7 Kern, medical personnel took an X-ray of Plaintiff’s foot, which was interpreted by radiologist T.
8 MacLennan. SAC ¶ 15. MacLennan noted a marked deformity of Plaintiff’s ankle and indicated
9 that follow-up X-rays should be considered, but Plaintiff received no further medical care while at
10 the North Kern facility. SAC ¶ 15.

11 Plaintiff was subsequently transferred to the Correctional Training Facility located in
12 Soledad, California. SAC ¶ 16. Once at Soledad, Plaintiff was initially examined by Doctor
13 Friederichs, who referred Plaintiff to the orthopedic clinic and stated that Plaintiff might benefit
14 from an orthotic shoe or ankle brace. SAC ¶¶ 16-17. After this initial consultation, Defendant
15 Dayalan examined Plaintiff twice, first on July 29, 2005, and then on August 30, 2005. SAC
16 ¶¶ 16-17. At the July 29 examination, Defendant Dayalan noted that an orthopedic specialist
17 would need to determine the proper device for Plaintiff’s condition and informed Plaintiff that he
18 would have to wait six to nine months before his orthopedic needs were met. SAC ¶ 16. On
19 August 30, 2005, Defendant Dayalan again noted that Plaintiff needed to be seen by an orthopedist
20 to prevent skin loss associated with his condition and to address his need for an orthotic brace.
21 SAC ¶ 17. He also noted that a podiatry referral for diabetic shoes was indicated. *Id.* While at
22 Soledad, however, Plaintiff received no further care or follow-up from Dayalan’s
23 recommendations. *Id.*

24 On April 13, 2006, Plaintiff was transferred to the California State Prison at Corcoran.
25 SAC ¶ 19. The next day, Defendant Saylor examined Plaintiff and diagnosed him with diabetes.
26 *Id.* Thereafter, Plaintiff was examined three times by Defendant Kahng. SAC ¶ 20. In May 2006,
27 Defendant Kahng confirmed that Plaintiff suffered from Charcot Joint, but concluded that Plaintiff
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1 did not need to be referred to a podiatrist at that time. *Id.* Nonetheless, on July 5, 2006, Plaintiff
2 saw David Smith, M.D., an orthopedic specialist. SAC ¶ 21. Dr. Smith found that Plaintiff had a
3 “completely destroyed right ankle joint related to his diabetes” and confirmed that it was a Charcot
4 Joint. *Id.* He referred Plaintiff to an orthotics clinic, and on August 11, 2006, Plaintiff was
5 assessed at the clinic and measured for a new camwalker. SAC ¶¶ 21-22. On September 19, 2006,
6 Plaintiff received the new camwalker. SAC ¶ 23. However, as the camwalker did not fit and
7 irritated Plaintiff’s skin, it was of no benefit to him. *Id.* At that time, Plaintiff also discovered that
8 his foot had become widened and swollen in a way that prevented him from using the new
9 camwalker. SAC ¶ 24.

10 Plaintiff alleges that after he discovered that the new camwalker provided no benefit, he
11 continued to seek further care for his swollen and deformed foot. SAC ¶ 25. While at Corcoran,
12 he remained under the care of Defendants Saylor, Kahng, and Nyenke. *Id.* On August 11, 2006,
13 Defendant Kahng noted that Plaintiff exhibited a “Charcot collapse,” and on April 12, 2007,
14 Defendant Nyenke noted the onset of an ulcer on Plaintiff’s right foot. *Id.* Plaintiff alleges that his
15 right foot continued to deteriorate in the absence of an appropriate camwalker, and his foot became
16 increasingly swollen and deformed. *Id.* Plaintiff was released from the California State Prison
17 system on July 19, 2007, and he sought private medical care on August 6, 2007. SAC ¶ 26.
18 Plaintiff alleges that his private medical provider informed him that the care he received in prison
19 was substandard and caused his foot and ankle to widen and swell to such an extent that his foot
20 required surgical repair. *Id.* In his opposition brief, Plaintiff states that he has recently learned that
21 his right foot will need to be amputated at the shin level.

22 **B. Procedural Background**

23 Plaintiff initiated the instant action on July 15, 2009. In his original Complaint, Plaintiff
24 named only the California Department of Corrections and Rehabilitation (“CDCR”) as a
25 Defendant, and asserted claims of negligence, violations of the Americans with Disabilities Act,
26 and deliberate indifference to Plaintiff’s medical needs in violation of Plaintiff’s Eighth
27 Amendment rights. Defendant CDCR moved to dismiss the Complaint on grounds that Plaintiff
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1 failed to identify a statutory basis for its negligence claim, the ADA claim was time-barred, and the
 2 Eleventh Amendment barred Plaintiff's claim for deliberate indifference. The Court granted the
 3 motion to dismiss and gave Plaintiff leave to amend his claims for negligence and deliberate
 4 indifference. Order Granting Def.'s Mot. to Dismiss with Leave to Amend, ECF No. 16.

5 Plaintiff then filed a First Amended Complaint ("FAC") that named nine individual
 6 defendants and alleged a single claim, pursuant to 42 U.S.C. § 1983, for deliberate indifference to
 7 Plaintiff's health and safety in violation of Plaintiff's constitutional rights. Defendants moved to
 8 dismiss the FAC, on grounds that Plaintiff's claim was time-barred and failed to state a claim for
 9 deliberate indifference. Based on the facts presented in Plaintiff's pleading, the Court did not find
 10 his claim time-barred, but dismissed the FAC for failure to plead facts sufficient to establish
 11 deliberate indifference to Plaintiff's medical needs. Order Granting Def.'s Mot. to Dismiss, ECF
 12 No. 47. The Court granted leave to amend, and Plaintiff subsequently filed a Second Amended
 13 Complaint ("SAC"). The SAC names as defendants four physicians employed at California State
 14 Prisons: Defendants Dayalan, Nyenke, Kahng, and Saylor. The SAC alleges a single cause of
 15 action, pursuant to 42 U.S.C. § 1983, for deliberate indifference to Plaintiff's health and safety. Of
 16 the four physician defendants named in the SAC, only Defendants Dayalan and Nyenke have been
 17 served and have appeared in this action. Defendants Dayalan and Nyenke now move to dismiss the
 18 SAC for failure to state a claim.

19 II. Legal Standard

20 A motion to dismiss for failure to state a claim under Rule 12(b)(6) tests the legal
 21 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In considering
 22 whether the complaint is sufficient to state a claim, the court must accept as true all of the factual
 23 allegations contained in the complaint, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), and draw all
 24 reasonable inferences in favor of the plaintiff. *Catholic League for Religious and Civil Rights v.*
 25 *City and County of San Francisco*, 567 F.3d 595, 599 (9th Cir. 2009). However, the court need not
 26 accept as true "allegations that contradict matters properly subject to judicial notice or by exhibit"
 27 or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
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inferences.” *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d 1049, 1055 (9th Cir. 2008). While a complaint need not allege detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949.

III. Discussion

A. Motion to Dismiss

Under the Eighth and Fourteenth Amendments, the government has an “obligation to provide medical care for those whom it is punishing by incarceration.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). This does not mean that every claim of inadequate medical treatment in prison states an Eighth Amendment violation. *Id.* at 105. To maintain an Eighth Amendment claim, a plaintiff must show “deliberate indifference to serious medical needs.” *Id.* at 104. The Ninth Circuit has articulated a two-part test for deliberate indifference in this context. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). First, the plaintiff must show “serious” medical needs by demonstrating that “the failure to treat [his] condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997). Second, the plaintiff must show that the defendant’s response to his need was deliberately indifferent. *Jett*, 439 F.3d at 1096. The deliberate indifference standard applied to Eighth Amendment claims “entails something more than mere negligence,” but “something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.” *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). Under this standard, “an inadvertent failure to provide adequate medical care” or “negligen[ce] in diagnosing or treating a medical condition” is not sufficient to establish an Eighth Amendment violation. A prison official acts with deliberate indifference only if the official “knows of and disregards an excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004).

1 In this case, Plaintiff argues that each of the named defendants had subjective knowledge of
2 the risk of serious harm to Plaintiff's foot and ankle, but nonetheless refused to provide Plaintiff
3 the immediate care he needed. Because Plaintiff seeks damages against individual prison
4 employees, Plaintiff must plead facts specific to each individual defendant which plausibly suggest
5 that the individual defendant acted with deliberate indifference. *See Leer v. Murphy*, 844 F.2d 628,
6 633-34 (9th Cir. 1988). In determining whether Plaintiff has met this standard, the court must
7 "scrutinize the particular facts and look for substantial indifference in the individual case,
8 indicating more than mere negligence or isolated occurrences of neglect." *Wood v. Housewright*,
9 900 F.2d 1332, 1334 (9th Cir. 1990). Accordingly, the Court will analyze the facts alleged as to
10 each Defendant in turn.

11 **1. Defendant Dayalan**

12 In the SAC, Plaintiff alleges that Defendant Dayalan examined Plaintiff twice at the
13 Soledad prison facility, once on July 29, 2005, and again on August 30, 2005. SAC ¶¶ 16-17.
14 Plaintiff alleges that at the time of these examinations, Dayalan had Plaintiff's medical chart, which
15 included a radiological study of Plaintiff's ankle and records of an initial consultation by Dr.
16 Friederichs. SAC ¶ 17. The radiological study indicated that Plaintiff had a "marked deformity at
17 the ankle" and suggested that further X-rays be considered. SAC ¶ 15. The records from Dr.
18 Friederichs's consultation indicated that Plaintiff could possibly benefit from an orthotic shoe or
19 brace, referred Plaintiff to an orthopedic clinic, and proposed that Plaintiff see an orthopedic
20 specialist named Dr. Pompan. SAC ¶¶ 16-17. After examining Plaintiff, Dayalan confirmed that
21 Plaintiff needed to be seen by an orthopedist and noted that a podiatry referral for diabetic shoes
22 was indicated. SAC ¶¶ 16-17. However, Dayalan informed Plaintiff that he would have to wait six
23 to nine months before his orthopedic needs would be met, and when Plaintiff was transferred out of
24 Soledad on April 13, 2006, he still had not seen a podiatrist or otherwise received follow-up care.
25 SAC ¶¶ 16-17.

26 Plaintiff argues that these facts raise a reasonable inference that Dayalan knew of Plaintiff's
27 immediate need for orthopedic care and willfully disregarded Plaintiff's medical needs by delaying
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1 follow-up care and allowing nine months to elapse before Plaintiff's foot was reexamined. It is
 2 well-established that the intentional denial, delay, or interference with medical treatment can
 3 constitute deliberate indifference that violates the Eighth Amendment. *Estelle*, 429 at 104.
 4 Although a delay in treatment, standing alone, does not constitute an Eighth Amendment violation,
 5 *see Shapley v. Nevada Bd. of State Prison Com'rs*, 766 F.2d 404, 407 (9th Cir. 1985), a plaintiff
 6 may make out an Eighth Amendment claim if the delay caused further harm and the defendant
 7 acted with deliberate indifference to the risk of harm posed by the delay. *McGuckin*, 974 F.2d at
 8 1060. Typically, plaintiffs make such a showing by alleging that they complained of a need for
 9 treatment, were visibly in pain, or were otherwise in obvious need of prompt medical care. *See*,
 10 *e.g., Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989) (plaintiff alleged that defendants were
 11 aware of his severe pain, "bleeding gums, breaking teeth and his inability to eat properly");
 12 *McMaster v. Thomas*, No. CV 1-04-6453-FRZ, 2010 WL 3785571, at *3 (E.D. Cal. Sept. 24, 2010)
 13 (plaintiff alleged that defendants knew his ankle was fractured based on x-rays and medical
 14 records, but told plaintiff it was not fractured, resulting in a long delay in treatment). A plaintiff
 15 may rely on "circumstantial evidence when the facts are sufficient to demonstrate that a defendant
 16 actually knew of a risk of harm," *Lolli v. County of Orange*, 351 F.3d 410, 421 (9th Cir. 2003), and
 17 need not allege that the harm from the delay was substantial or significant. *McGuckin*, 974 F.2d at
 18 1060.

19 Defendants argue that the facts alleged do not plausibly suggest that Plaintiff had an
 20 immediate need for orthotic care in the summer of 2005. They note that Plaintiff does not
 21 explicitly allege that he was in pain when Dayalan examined him in July and August of 2005, or
 22 that he informed Dayalan that he needed immediate care. Nonetheless, it appears that Dayalan
 23 knew a great deal about Plaintiff's medical condition, and the facts in front of him suggested that
 24 Plaintiff had serious medical needs that should be promptly addressed. Taking the allegations in
 25 the SAC as true, Dayalan knew that the camwalker Plaintiff wore to support his ankle had been
 26 taken away and that X-rays showed a "marked deformity" of Plaintiff's ankle. SAC ¶¶ 15, 17.
 27 Dayalan also knew that Dr. Friederichs had considered Plaintiff's condition serious enough to
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warrant a referral to an orthopedic clinic and an orthopedic specialist, but that Plaintiff had not yet been seen at the clinic or by a specialist. Additionally, based on his own examination, Dayalan determined that Plaintiff suffered from diabetes-related Charcot Joint and needed to see an orthopedic specialist to prevent skin loss and other issues related to his condition. He also determined that Plaintiff needed to see an orthopedist and podiatrist to obtain an appropriate orthotic device and/or diabetic shoes. SAC ¶¶ 15-17. Based on these facts, it is entirely plausible that Dayalan knew that Plaintiff had a serious medical condition. More importantly, it is also plausible that Dayalan knew that Plaintiff could suffer from complications, such as skin loss, if his foot was not treated in a prompt manner. *Cf. Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (finding that defendants may have been deliberately indifferent where they “disregarded evidence of complications to which they had been specifically alerted”). Yet even though Plaintiff had already been waiting to see a specialist since his examination by Dr. Friederichs, Dayalan told Plaintiff that his medical needs would not be met for another six to nine months. SAC ¶ 16. Based on these facts and reasonable inferences, Plaintiff makes a plausible argument that Dayalan knew of Plaintiff’s need for immediate orthopedic care and acted with deliberate indifference by authorizing an additional six- to nine-month delay in treatment.

The Court is mindful of the fact that Dayalan may not have been in a position to offer Plaintiff an immediate appointment with a specialist, and there may not have been alternative treatments that he could have provided in the interim. As the factual record is developed, it may turn out that Dayalan could not offer immediate treatment or that the facts before him did not indicate a need for immediate care. *See Hunt v. Dental Dept.*, 865 F.2d 198, 201 (9th Cir. 1989) (reversing grant of summary judgment, but acknowledging that development of the factual record could fail to demonstrate liability). At this stage of proceedings, however, the Court is required to take the allegations as true and draw all reasonable inferences in favor of Plaintiff. *Catholic League for Religious and Civil Rights*, 567 F.3d at 599. Under this standard, the Court finds that the facts alleged indicate that Plaintiff’s medical needs were serious, that his condition deteriorated during his incarceration, and that Dayalan did not take steps to ensure that Plaintiff received

prompt medical treatment. This is sufficient to survive a motion to dismiss. Accordingly, Defendants' motion to dismiss the claims against Defendant Dayalan is DENIED.

2. Defendant Nyenke

Plaintiff's allegations against Defendant Nyenke are also sufficient to survive a motion to dismiss. The SAC alleges that Plaintiff remained under the care of Defendants Nyenke, Saylor, and Kahng during his incarceration at the Corocoran facility, between April 2006 and July 2007. SAC ¶ 25. On July 5, 2006, Plaintiff finally saw an orthopedic specialist, who determined that Plaintiff had a "completely destroyed right ankle joint related to his diabetes." SAC ¶ 21. Plaintiff obtained a replacement camwalker, but soon discovered that it did not properly fit his widened and swollen foot. SAC ¶ 24. Plaintiff alleges that he then continued to seek further care for "his now greatly swollen and deformed foot." SAC ¶ 25. On April 12, 2007, Defendant Nyenke examined Plaintiff and "noted an onset of ulcer to plaintiff's right foot." *Id.* Plaintiff alleges that despite this observation, Nyenke disregarded Plaintiff's need for further medical care and refused to provide the care necessary to prevent the continued eroding of his foot. *Id.* Taking these allegations as true and construing the complaint in the light most favorable to Plaintiff, it appears that Nyenke knew that Plaintiff was developing an ulcer and nonetheless declined to provide preventative treatment. Whether Nyenke's failure to provide treatment was an act of deliberate indifference, mere negligence, or a determination that nothing more could be done cannot be determined on the basis of the pleadings alone. *See Farmer*, 511 U.S. at 842 ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways"). On a motion to dismiss, therefore, Plaintiff's allegations are sufficient to state an Eighth Amendment claim against Defendant Nyenke. Accordingly, the motion to dismiss Plaintiff's claims against Defendant Nyenke is DENIED.

B. Defendants Kahng and Saylor

In his opposition brief, Plaintiff addresses the merits of his claims against Defendants Kahng and Saylor. As Defendants Dayalan and Nyenke point out, neither of these Defendants has been served or appeared in this case. Federal Rule of Civil Procedure 4(m) provides that "[i]f a

1 defendant is not served within 120 days after the complaint is filed, the court . . . must dismiss the
2 action without prejudice against that defendant or order that service be made within a specified
3 time.” Plaintiff filed this action on July 15, 2009, and filed an amended complaint naming
4 Defendants Kahng and Saylor on December 3, 2009. Plaintiff’s 120-day period to serve these
5 Defendants is thus long past. At the motion hearing, Plaintiff’s counsel indicated that he had not
6 been able to locate current addresses for Defendants Kahng and Saylor and agreed that dismissal of
7 these Defendants under Rule 4(m) was appropriate. Accordingly, the Court hereby DISMISSES
8 Defendants Kahng and Saylor without prejudice for failure to serve them in the time required by
9 Rule 4(m).

10 **IV. Conclusion**

11 For the foregoing reasons, the Court DENIES Defendants’ motion to dismiss and
12 DISMISSES Defendants Kahng and Saylor without prejudice. The case will proceed on the
13 schedule adopted at the Case Management Conference.

14 **IT IS SO ORDERED.**

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16 Dated: February 21, 2011

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19 LUCY H. KOH
20 United States District Judge
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